

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUN 30 2000

OFFICE OF THE SECRETARY

In The Matter of)

)
 Amendment of the Commission's Rules)
 Regarding Installment Payment Financing for)
 Personal Communications Services (PCS))
 Licenses)

WT Docket No. 97-82

To: The Commission

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. ("SBC") hereby files this reply to certain of the comments filed in response to the Commission's Further Notice of Proposed Rulemaking (the "FNPRM") regarding the eligibility rules for participating in the re-auction of C and F block PCS authorizations.

DISCUSSION

I. THE COMMISSION SHOULD CHANGE THE ELIGIBILITY RULES TO ALLOW OPEN BIDDING FOR THE RE-AUCTIONED LICENSES

As SBC has previously shown in its petition for a waiver of the eligibility rules¹ and in its comments in response to the FNPRM (the "SBC Initial Comments"), the public interest requires the Commission to open up the bidding process in order to put this spectrum into the hands of carriers who can quickly build out facilities and help satisfy the fast-growing demand for wireless services. In particular, it is important to allow the large carriers to bid on this spectrum so that they can use it to bring to the public

¹ See Petition of SBC Communications Inc. for a Waiver of Section 24.709 and for Expedited Action (filed January 21, 2000).

substantial competitive benefits, such as nationwide single-rate plans, that the Commission has recognized and encouraged.

Moreover, given the difficulties that companies like NextWave and others have encountered in the past, as well as the uphill battle small companies will face in the future if they try to serve just one or a few major markets in competition with carriers who have a national footprint, it does not make sense for the Commission to continue to set aside large amounts of spectrum for uses that do not make economic sense.

Predictably, however, a number of the same entrepreneurs that opposed SBC's waiver petition also oppose the Commission's attempt to craft a compromise between the old system of closed bidding and the requests of SBC and many others to waive those rules. Most of these comments do not add anything to the various submissions made in opposition to SBC's request for a waiver. For example, a number of the comments suggest that the Commission's compromise proposal is improper because Section 309 of the Communications Act effectively mandates set-asides for small businesses.²

Even putting aside the fact that the Commission has already conducted multiple auctions exclusively for small businesses, however, the fact is that nothing in the statute mandates such set-asides and that both the legislative history and the case law confirm that there is no such requirement.³ Indeed, Section 309(j) of the Communications Act,

² See Advanced Telecommunications Technology, Inc. ("Advanced") at 2; National Telephone Cooperative Association ("NTCA") at 2; Northcoast Communications, LLC ("NorthCoast") at 8; OPM Auction Co. ("OPM") at 3; The Personal Communications Industry Association ("PCIA") at 2; The Rural Telecommunications Group and the Organization for the Promotion & Advancement of Small Telecommunications Companies ("RTG/OPASTCO") at 3-4.

³ See Reply Comments of SBC Communications Inc., filed in DA 00-91 (filed March 1, 2000) ("SBC Reply Comments").

which governs competitive bidding, does not even mention set-asides. Rather, it provides only that the Commission should “seek to promote” the dissemination of licenses to small businesses and that, in doing so, it should “consider” such devices as “alternative payment schedules,” “tax certificates” and “bidding preferences.” 47 U.S.C. § 309(j)(3),(4). Moreover, the legislative history of the statute expressly states that it does not require the Commission to adopt any particular procedure in order to promote participation by small businesses:

The [House Budget]Committee has not included provisions in section 309(j) to direct the Commission to include, or exclude, any company (or group of companies) from eligibility; to determine that the “excessive concentration” provisions be read in any particular way, or to imply a preference for any proposed licensing scheme over another.⁴

Indeed, in addition to stating that the Commission has discretion to adopt whatever steps are appropriate to assist small businesses, the Committee stressed that “it did not intend that this objective dominate the Commission’s decision-making when it adopts regulations to implement the competitive bidding process.”⁵ Thus, far from mandating set-asides, the legislative history of Section 309(j) makes it clear that they are not required and that the Commission has considerable discretion to take whatever steps it believes are appropriate to encourage small businesses.⁶

⁴ H.R. Rep. No. 103-111, at 256-57 (1993).

⁵ *Id.* at 254.

⁶ The Commission’s discretion in this area was also confirmed by the DC Circuit’s decision in Fresno Mobile Radio, Inc. v. Federal Communications Commission, 165 F.3d 965 (D.C.Cir. 1999), in which the court upheld the Commission’s decision to eliminate installment payments for small businesses that won SMR licenses and to rely on bidding credits to assist small businesses. The court ruled that the Commission had the authority both to determine what methods it would use to render such assistance and to balance the

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Most of the comments filed by entrepreneurs do not contest the fact that smaller companies have had little success in large markets. To the extent they have succeeded at all, that success has come almost exclusively in small and medium sized markets. Yet, a few entrepreneurs suggest that they will be able to compete in major markets and that most, if not all, of the licenses in those markets should be subject to closed bidding.⁷ This contention simply ignores the undeniable market conditions and forces that are shaping the wireless industry. A small company entering the market today will face many established competitors with facilities in place, existing customer bases and widespread name recognition. Moreover, even if a small company could pay for a license in a major market and afford to build facilities, it could never hope to offer the kind of single-rate plans and consistent service features that require a national footprint. As other commenters noted,⁸ it is unreasonable to believe that such companies could compete effectively with the major carriers. Therefore, it does not make sense to continue to reserve this spectrum solely for them.

II. TIER 1 BTAs SHOULD HAVE ONE MILLION POPS

Although the FNPRM tentatively decided to adopt a tiered system for determining the extent of open bidding, it also stated that the Commission might ultimately decide not to adopt tiers.⁹ As discussed in its initial comments on the FNPRM, SBC believes that

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interests of small business participation against other public interest considerations. See SBC Reply Comments at 12-13.

⁷ See Leap Wireless International, Inc. (“Leap”) at 15; Northcoast at 2, 5 n.10;

⁸ See Nextel Communications, Inc. (“Nextel”) at 6-11; AT&T Wireless Services, Inc. (“AT&T”) at 8.

⁹ See FNPRM, ¶ 30.

the public interest would best be served by allowing open bidding for all licenses, in all markets.¹⁰ A number of other commenters have supported this result,¹¹ and SBC urges the Commission to revisit this issue and to open up bidding broadly.

If the Commission does decide to adopt a tiered approach, however, its suggestion that the top tier should consist of BTAs with a population over 2.5 million is far too restrictive. This proposal would allow open bidding for two 10 MHz C block licenses in only nine markets and would greatly restrict open bidding in a number of major markets. Indeed, as some commenters noted, since the Commission proposes to use 1990 census data, it is likely that even some markets that currently exceed 2.5 million pops will not be included in the first tier.¹²

In its initial comments, SBC suggested that, if the Commission decides to adopt tiers, the top tier should be comprised of all BTAs with over one million pops.¹³ Several other commenters made the same suggestion, rather than endorsing the alternative figures of 2 million or 1.5 million mentioned in the FNPRM.¹⁴ In view of the market realities that will restrict the ability of smaller companies to compete in larger markets, as well as the number of comments that suggested the one million pops figure, SBC urges the

¹⁰ See SBC Initial Comments at 3-8.

¹¹ See BellSouth Corporation (“BellSouth”) at 2; Nextel at 5; Verizon Wireless (“Verizon”) at 4-10.

¹² See Verizon at 11; Nextel at 12.

¹³ See SBC Initial Comments at 3-8. SBC originally proposed a compromise that would have established a first tier of markets with pops of 700,000 or greater, but it believes that drawing the line at one million pops is a reasonable compromise.

¹⁴ See AT&T at 7-8; Nextel at 12-13; US West Wireless, LLC (“USWest”) at 2, 5; Verizon at 14 n.13; VoiceStream Wireless Corporation (“VoiceStream”) at 4-5.

Commission, if it elects to use tiers at all, to establish a top tier of BTAs with over one million pops.

III. THE COMMISSION SHOULD ALLOW NEW ENTRANTS TO OBTAIN MORE SPECTRUM THAN INCUMBENTS

Although it stated that the Commission would consider other options, the FNPRM tentatively concluded that the 30 MHz C block licenses should be split into three 10 MHz licenses, that open bidding should be permitted on two of those licenses in Tier 1, and that open bidding below Tier 1 should be limited to only one of the three C block licenses.¹⁵ In its initial comments, SBC urged the Commission to amend this proposal by allowing new entrants to bid on all three licenses so that they could obtain enough spectrum to compete effectively with incumbent providers who already have 25, 30 or more MHz. In particular, SBC noted – as the Commission has itself stated in the past – that 30 MHz is needed to offer a full range of voice and data wireless services.¹⁶ Accordingly, it is important to give new entrants the opportunity to obtain that much spectrum.

A large number of commenters – including a number of entrepreneurs – agreed with SBC’s statement that 10 MHz is simply not enough spectrum to be an effective competitor for voice and data. This is particularly true in major markets. For example, the Personal Communications Industry Association stated as follows:

In fact, 10 MHz is simply not enough. A 10 MHz license dooms that licensee to inevitable failure. PCIA members, trying to put the Commission’s predictions into practical application in concrete business plans, have found that these numbers simply do not add up. Although it is

¹⁵ See FNPRM, ¶ 28.

¹⁶ See SBC Initial Comments at 9.

theoretically possible to begin providing pared down, basic service with 10 MHz, a business plan premised on the availability of only 10 MHz of spectrum is doomed to failure in the long run. ... PCIA believes that 30 MHz is necessary to truly compete for the voice and data services that comprise the wireless market.¹⁷

Many other commenters made similar statements.¹⁸

Given the widespread agreement on this point, especially among companies who took starkly different positions on other aspects of the FNPRM, SBC asserts that the need to make sure that new entrants are not hobbled by a lack of spectrum should be apparent. Accordingly, it urges the Commission to allow new entrants to bid on and obtain all three 10 MHz C block licenses.

IV. THE COMMISSION SHOULD ALLOW OPEN BIDDING FOR ALL OTHER LICENSES

In its initial comments, SBC supported the Commission's tentative decision to allow open bidding on both the 15 MHz C block licenses and the 10 MHz F block licenses that will be included in the re-auction.¹⁹ While there appears to be no real opposition to the proposal to allow open bidding on the 15 MHz licenses, a number of entrepreneurs have urged the Commission not to allow open bidding for the F block licenses.²⁰ SBC strongly urges the Commission to reject these suggestions and to open up the bidding for the F block.

¹⁷ PCIA at 18-19.

¹⁸ See Advanced at 3-4; America Connect, Inc. ("America Connect") at 3-4; Burst Wireless ("Burst") at 2; Alpine PCS, Inc. at 6-10; NTCA at 8-9; Northcoast at 4 and n.9; OPM at i, 2, 6-8; RTG/OPASTCO at 4-5; U.S. AirWaves, Inc. at 5-6.

¹⁹ See SBC Initial Comments at 11-12.

²⁰ See AirGate Wireless, L.L.C. at 6-7; Alaska Digitel at 3-4; America Connect at 3; Burst at 3; Carolina PCS I Limited Partnership ("Carolina") at 3-5; Leap at 4-5;

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Nothing in the comments of the parties opposing the Commission's tentative conclusion on this issue provides any reasoned basis for closing the bidding. Rather, these comments reflect nothing more than the commenters' desire to have the government give them as much of an artificial advantage as possible. As the FNPRM recognized, however, there is no good policy reason not to allow open bidding for the F block licenses.²¹ In most of the markets where an F block license is up for re-auction, there is already a C block license held by an entrepreneur, so there is no need to create an additional set-aside to have a small company in the market. Moreover, notwithstanding the claims of some commenters, the Commission recognized that other F block licenses are being built out more slowly than it had hoped and that opening up the bidding should speed services to the public. Finally, the F block licenses to be re-auctioned cover a number of major markets where, as discussed earlier, small entrepreneurs will not be able to compete effectively. Accordingly, SBC requests that the Commission affirm its tentative decision to allow open bidding for these licenses.

V. THE COMMISSION SHOULD REMOVE THE TRANSFER REQUIREMENTS FOR C AND F BLOCK LICENSES

In its initial comments, SBC supported the Commission's tentative decision to remove some of the restrictions on the transfer of C and F block licenses, but it urged the Commission to go farther by removing these restrictions altogether.²² Such action would

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Northcoast at i, 4; OPM at 2, 9; Twenty First Wireless, Inc. at 6; U.S. Small Business Administration, Office of Advocacy at 7-8. Other carriers, however, support open bidding for the F block. *See* Cook Inlet Region, Inc. ("Cook") at 1; Nextel at 15; Roseville PCS, Inc. at 1-2; US West at 4; Verizon at 14-15; VoiceStream at 5.

²¹ *See* FNPRM, ¶ 31.

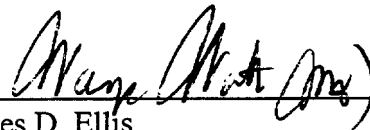
²² *See* SBC Initial Comments at 11-12.

recognize that these licenses are nearing the time when they would have been freely transferable if they had been put into use under the Commission's original schedule, and that it is good public policy to facilitate the development of a secondary market in spectrum.

Many commenters support a loosening of the transfer restrictions, and there is little opposition.²³ Especially in light of the need to promote efficiency by facilitating the role of market forces in allocating spectrum, SBC urges the Commission to remove these restrictions.

CONCLUSION

For the reasons, and in the manner set forth above and in SBC's initial comments in response to the FNPRM, the Commission should modify its rules to allow SBC and other qualified applicants to bid on licenses in the upcoming re-auction of C and F block spectrum.



James D. Ellis
Wayne Watts
Carol L. Tacker
SBC Communications Inc.
175 E. Houston
San Antonio, TX 78205
(210) 351-3476

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²³ See BellSouth Corporation at 12-13; Carolina at 6-8; Cook at 1-6; OPM at 13; STPCS Joint Venture, LLC at 3-5; VoiceStream at 6-12.

CERTIFICATE OF SERVICE

I, Philip W. Horton, hereby certify that a copy of the foregoing Reply Comments of SBC Communications Inc. was served by hand this 30th day of June, 2000, on the following persons:

Hon. William E. Kennard
Chairman
Federal Communications Commission
Room No. 8-B201
445 12th Street, S.W.
Washington, DC 20554

Hon. Susan Ness
Commissioner
Federal Communications Commission
Room No. 8-B115
445 12th Street, S.W.
Washington, DC 20554

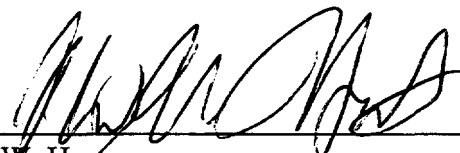
Hon. Harold W. Furchtgott-Roth
Commissioner
Federal Communications Commission
Room No. 8-A302
445 12th Street, S.W.
Washington, DC 20554

Hon. Michael K. Powell
Commissioner
Federal Communications Commission
Room No. 8-A204
445 12th Street, S.W.
Washington, DC 20554

Hon. Gloria Tristani
Commissioner
Federal Communications Commission
Room No. 8-A302
445 12th Street, S.W.
Washington, DC 20554

Office of the Secretary
Federal Communications Commission
TW B204
445 12th Street, S.W.
Washington, DC 20554

Audrey Bashkin
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4A-664
Washington, DC 20554



Philip W. Horton